The Economic and the Social in EU Law:

the Slovak case "Dôvera" and the difficult construction of the European social market economy

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1. Premises to the case: introductory remarks

The creation of the Common Market in 1957 marked the beginning of the economic integration among Member States. The main purpose was to reach economic prosperity and peace among the peoples of Europe, through the respect of the Fundamental Freedoms (free movement of goods, persons, services and capitals) the Competition provisions.

Problems arise when public actors and particularly the State, play a role in the market, not only to contribute to the general economic development but mainly for social and public purposes[2]. The European integration erodes progressively State monopolies favoring the establishment of a free and competitive market to enhance innovation and wealth[3]. Notwithstanding the benefits of liberalized sectors, private entities would not provide certain kinds of services and/or goods that are not revenue-making but exclusively solidarity-based (the so-called *market failures*[4]*).* Generally, economic activities are profit-seeking activities. So, to avoid the unpleasant result of having social and economic discrepancies, State intervention in the market appears to be necessary.

After the Lisbon Treaty, though, article 3 TEU[5], the market is also based on a social dimension that, recalling the principle of the Ordoliberalism, a free market economy is the best system to protect wealth and freedom but keeping in mind that a solid competition regulation is not enough: it is crucial

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[2] See Damjanovic D. and de Witte B., *Welfare integration through Law: The Overall Picture in the Light of the Lisbon Treaty*, EUI Working Papers, Law, 2008/34, 5-6: "[…] *The Member States, from their side, continue to provide specific welfare services within their social policy systems and their health and education systems (the 'core' of the welfare state), and also through their public utilities (the 'outer ring' of the welfare state), and all these are regarded to be within their primary responsibility."*

[3] See generally Craig P., *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford University Press 2010, ch. 8 *"The Treaty, the Economic, and the Social",* p. 286;

[4] The ECJ tolerance over State intervention in the market concerns social purposes. See Craig P., *The Lisbon Treaty. Law, Politics, and Treaty Reform,* Oxford University Press 2010, ch. 8 p. 302; Nistor L. *Public Services and the European Union. Legal Issues of Services of General Interest,* TMC Asser Press 2011, ch 2; For an in-depth analysis on market failures see Burke J.M., *A Critical Account of Article 106(2) TFEU. Government Failure in Public Service Provision,* Hart Publishing 2018;

[5] Art 3 TEU "*1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. […]"*

for the correct functioning of this market to guarantee goods and services that are not profitable[6]. In the light of a social construction of the market, provisions aiming at protecting the market are applicable also to the State: the same principle followed by private operators are relevant for the State-regulator which cannot favor or force anticompetitive behaviors. However, what happens to those services which must be ensured to the whole population: the social services? Inside a market-oriented approach and regulation, monopolies are considered incompatible with the ultimate European goal of leveling the playing field for all economic operators.

This is why, the Commission have acknowledged the overarching category of Services of General Interest to encompass all different European traditions in public services and ensure to provide a universal, public and accessible services for those who cannot afford them and for companies which follow a profit-making business. This is the reason why the State enters into the market and can entrust economic operators (both public or private) with a public service obligation (PSO), to fulfill a mission for the general interest, which is economically compensated within the limit of the proportionality and necessity test under article 106(2) TFEU. If this compensation exceeds what is necessary and proportional to fulfill the mission of general interest, it could be classified as an illegal state aid incompatible with the internal market.

Nonetheless, the nature of the service concerned makes it qualifying as a Service of general economic interest (SGEIs) or a Social service of general interest (SSGIs), which are, generally, excluded from the application of competition provisions on State aid. What is not excluded from EU Law is the economic nature of social services, the so-called Economic Social Services of General Interest (ESSGIs)[7]. Around the economic character, the Commission goes further in its Communication of 2007 stating that despite the social purpose SSGIs are economic activities under the Internal Market provisions of the Treaty, having the consequence to be subject to general principles such as non-discrimination.[8]

The application of the Treaty provisions depends on the assessment of the main purpose pursued by the entity: undertakings exercising both economic and social activities will be justified only on the basis that the activity is non-economic in nature; the economic character is negligible; the performance of non-economic activities cannot be separated from that of economic activities[9].

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[6] See Malaguti M.C., *I valori della concorrenza e del mercato nell'Unione Europea: da Roma, a Maastricht, a Lisbona,* Moneta e Credito, 68(272), p. 401-418, Banca Nazionale del Lavoro, 2015.

[7] Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* p. 36 and ff*;* Sauter W. and Schepel H., *State and Market in European Union Law: the public and private spheres of the Internal Market before the EU courts;*

[8] COM(2007)725 *Services of general interest, including social services of general interest: a new European commitment.*

[9] Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-00043 p. 27: "*[…] Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services".*

The case study on the Slovak social security system starts from the assumption that Member States are free to organize and manage their national social security systems but conversely, how the systems get financed may arise issues of compatibility with the internal market and solidarity constituted the defense of national measures against the erosive power of the European market integration.

In time, the case law measured how many competition or solidaristic indexes were present in social security schemes and judged differently on a case by case analysis whether the scheme could have been considered economic or non-economic therefore, not subject to competition law provisions.

In the long case dealing with the funding of the Slovak social security system the Commission, the Slovak State and the private operators in the field tried to challenge the definition of "undertaking" and "economic activity" in the social security sector, making the already difficult distinction between the Economic and the Social more complicated. The complicated dialogue between the Commission, the General Court and the Court of Justice showed the different aspects of evaluating competition and social elements in respect to their functions and purposes.

The Slovak saga showed how European courts still find difficult to read and analyze, at first sight, the difference between economic and non-economic activities, plus, how to differentiate economic elements functional to guarantee the accomplishment of solidarity-based services. This case might become a tool to better assess competition and social indexes under the functional approach and see whether the outcome proves to be economic or social.

1.1 Case law on social security and state aid law

The source of tension between competition and social policy has gradually developed since the liberalization process[10]. In one of the first cases in the social security field, *Sodemare*[11] , Advocate General Fennelly explains that social solidarity *"envisages the inherently uncommercial act of involuntary subsidization of one social group by another"*[12]. Pursuing social objectives may lead Member States to withdraw social security operations from the private market.

The fundamental notion in cases where State Aid Law applies also in matters dealing with social security systems, is whether the activity may not be considered economic and if the principle of solidarity prevails.

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[10] See Gallo D., *Social Security and Health Services in EU Law: Towards Convergence or Divergence in Competition, State Aids and Free Movement?* EUI Working Paper RSCAS 2011/19, p. 2; Smejkal V., *Competition Law and the social market economy goal of the EU,* in International Comparative Jurisprudence 1, p. 36;
[11] Case C-70/95 *Sodemare SA,* 1997 I-03395;
[12] Opinion of Advocate General Fennelly, 6 February 1997, Case C-70/95, par. 28;

The ECJ case law permits to identify three forms of solidarity that exclude the economic activity[13]: the first type is the "redistributive solidarity", involving the redistribution of income between those who are wealthy (in terms of finances and health) and those who would be deprived of the necessary social cover. In this context the funds provide cover for all who apply, regardless of their financial status and state of health. The second type is the "financial solidarity" between different social security schemes. Those schemes in surplus contribute to the financing of those with structural financial difficulties (i.e. a risk equalization scheme, which works by taking a portion of all health insurance premiums, through taxation, and putting them into a fund. Then, the fund contributes to finance insurers who have older and sicker customers, making health insurances affordable to everyone). The third type is the "intergenerational solidarity", based on the contributions of active employed workers directly used to finance the benefits paid to the pensioners. These forms of solidarity with the State intervention in the market are necessary because private undertakings run insurance schemes on the basis of the capitalization principle focused on financial investments, which lead to select wealthier and less risky customers. Mostly, Member States may impose public service obligations on undertakings when the market fails to provide what citizens need, through a public act that is sufficiently clear, detailed and compulsory. Additionally, Member States must prove the proportionality and necessity to the citizens' needs[14].

Non-economic services of general interest (NESGIs) such as statutory and complementary social security scheme, which are solidarity-based are characterized by a series of indexes, elaborated by the Court of Justice through its case law. In *Poucet et Pistre,* the Court declared the insurance system, solidarity-based, because the affiliation was compulsory and both contributions and benefits were fixed by the legislator, regardless the amount of individual contributions[15]. In *Cisal,* a body entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases, was recognized its exclusively social function. The non-profit character of the scheme and non-proportionality of the benefits to the insured persons' earnings implies a less-restrictive application of the functional approach by the Court to assess the economic nature. Even though, the insurer may fix a minimum and a maximum amount for contributions, the activity is non-economic[16]. When the scheme displays elements of competition such as dependency of entitlements on the contributions paid and the financial results of the scheme, optional membership and for-profit

[13] Ibid. Gallo D., p. 10; also Gallo D., Mariotti C., *Social Services of General Interest,* ch. 9, in Hancher L., Ottervanger T., Slot P.J. (eds.) *EU State Aids,* Sweet&Maxwell, 2021, p. 313

[14] See Nicolaides P., *Services of General Economic Interest: Proper Definition and Avoidance of Overcompensation,* in State Aid Hub, Lexxion, January 2019;

[15] Para. 13-15-18;

[16] It was permitted in Case C-306/01 and C-355/01 *AOK* EU:C:2004:150, par. 47-55; in C-244/94 *FFSA v Ministère de l'Agriculture* EU:C:1995:392 par. 17-20;

characters, these must not prevail over the social purpose of the scheme, when balancing the economic and social weight.

Also the possibility to separate economic and social activities may change the final outcome: when the activity is inseparably connected to the social function, it cannot be classified as economic, this was stated in *EasyPay*[17]. The Bulgarian postal operator enabled the payment of retirement pensions and it was asked whether the activity could be deemed part of the management of the public social security service; the social character of the activity must be strictly connected to the national pensions system and in this case, the postal service only handle the payments of retirement pensions.

It is not easy for Member States to assess in advance the economic nature of the activity exercised because the Court of Justice interprets the notion on a case-by-case analysis, considering sometimes bodies, despite the presence of solidarity-based elements, as undertakings performing economic activity and other times assessing the same elements as non-economic.

1.2 Undertakings in social services (at-a-glance)

The Treaty provisions on Competition refer to Undertakings. Undertakings are not defined in the Treaty. The features of an economic activity were elaborated by the Court of Justice in the leading case *Hofner and Elsner*[18], in which the Court not only specifies what is an economic activity but also, how undertakings should be defined: "*every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed*"[19]. As this may appear to be a very broad definition, much more wide and comprehensive than those adopted by Member States, the main point is the definition of "economic activity": it was concluded that profit-seeking or economic purposes are not relevant for the definition, what counts is the offering of goods and services on a market[20]. Moreover, the exercise of public authority excludes the economic nature, albeit it can be used for some activities and not for others[21] (*FENIN).* Recalling the *Hofner* case, it was said that if an activity could have been provided by a private entity for profit, this must be considered economic, even though the activity "is normally entrusted to public agencies"[22].

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[17] Case C-185/14 *EasyPay v Ministerski savet na Republika Bulgaria* EU:C:2015:716, para. 38-43;
[18] Case C-41/90 *Hofner* [1991] ECR I-1979, par. 21.
[19] See Case 118/85 *Commission vs Italy*, [1987], ECLI:EU:C:1987:283, point 7;
[20] See CJEU, Joined Cases C-180/98 and C-184/98 *Pavel Pavlov and others.* [2000] ECR I-6451, par. 75.
[21] See Hervey T., *If Only It Were So Simple: Public Health Services and EU Law,* ch 7, p. 189, in Cremona M., *Market integration and public services in the European Union,* Oxford University Press, 2011.

[22] See *Hofner,* par. 22. In opposition the Court explained the "essential State function" in *Eurocontrol* and *Diego Calì,* fn. 151 and 161.

Generally speaking, the Court decided to determine the concept of "undertaking" under a functional approach, disregarding the subjective element, on a case-by-case analysis[23].

Dealing with social services, undertakings would fall under competition measures if their services can be defined as economic. Without the solidarity principle and the purely social function balancing the economic interests of the market, these services are economic[24]. In *Poucet et Pistre*[25], the conclusion of the judgement does not include in the concept of undertakings, organizations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity. Paragraph 18 explains how the activity is entirely non-profit making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions. The operators were not able to influence the amount of contributions which were totally under State control. As well as in *AOK,*[26] the exclusive social function was fulfilled by sickness funds which were obliged to offer benefits to their members independently from the amount of contributions and the funds mutually equalized costs and risks. Both cases *Poucet* and *AOK* express the principle of redistribution within which incomes are distributed between those who are better off and those who would be deprived of the necessary social cover[27]. Particular significance has the way in which the schemes are managed: under the capitalization principle, contributions and benefits are determined autonomously based on the administrative costs and financial results of the fund and it is more likely to be considered an undertaking; conversely, under the risk equalization principle, different operators in the same sector share a mutual risk equalizing costs and benefits among the same operators, making more likely not to be considered an undertaking[28].

A different conclusion was adopted in *Fédération Francaise des Sociétés d'Assurances*[29], a non-profit organization providing a supplementary old-age scheme which intended to supplement a basic compulsory scheme. Even though, the Court observed the display of elements of solidarity, the

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[23] See Jorgensen C.H., *Private Distortion of Competition and SSGIs,* ch. 11 in Neergaard U., Szyszczak E., van de Gronden J., Krajewski M., *Social Services of General Interest in the EU,* The Hague, 2013; Iannello C., *Poteri pubblici e servizi privatizzati. L'idea di servizio pubblico nella nuova disciplina interna e comunitaria,* Giappichelli Editore, Torino, 2005;

[24] Stanciulescu A., *The concept of undertaking in the European Union Competition Law* in Challenges in the Knowledge Society 12, p. 668-674, Nicolae Titulescu University Publishing House, 2018; van de Gronden J., *Services of General Interest and the Concept of Undertaking: Does EU Competition Law apply?* in World Competition 41(2), p. 197-224, Kluwer Law International, 2018; van de Gronden J., Guy M., *The role of EU competition law in health care and the undertaking concept,* in Health Economics, Policy and Law, Cambridge University Press, 2020.

[25] Case C-159/91 *Poucet et Pistre* [1993] ECR I-637.

[26] Cases C-262, 306, 354 and 355/01 *AOK Bundesverband v Ichthyol-Gesellschaft Cordes, Hermani & Co* [2004] ECR I-2493.

[27] *Poucet* para. 10 and *AOK* para. 53;

[28] See Dunne N., *Knowing When to See It: State Activities, Economic Activities, and the Concept of Undertaking,* p. 442;

[29] Case C-244/94 *Fédération Francaise des Sociétés d'Assurances* [1995] ECR I-4013.

organization was defined as an undertaking because it operated under capitalization principles and benefits depending on the amount of contributions.

Extremely relevant in this sense is the *Albany*[30] judgement in which AG Jacobs, in his opinion[31], suggested two arguments: whether the activity was carried on by a public entity and whether it was in a position to adopt a certain line of conduct. The fact concerned a supplementary pension fund, in the textile sector, which was non-profit-making and obliged to accept all workers, without a prior medical examination. The Court acknowledged the social objective, but the fund could decide the amount of contributions, benefits received (connected to the financial results) and arbitrarily grant exemption from the affiliation[32].

The same reasoning was followed by the Court in *AG2R Prévoyance*[33]*:* the French bakery sector set up a compulsory affiliation scheme to complete the social security coverage offered by the basic statutory scheme, for a supplementary reimbursement of healthcare costs. Contrary to *Albany*, the French Decree didn't establish any exemption to the affiliation, which the Court evaluated as a strong solidaristic element, and all companies paid the same amount of contributions; however, *AG2* maintained a margin of negotiation to decide the details to its appointment and the influence of the latter on the functioning of the scheme[34]. Consequently, the choice to appoint *AG2R* was made among other undertakings, offering different conditions, in competition with it.

A particular case in 2017, *Congregacìon de Escuelas Pìas Provincia Betania*[35] challenged the Court on the application of State Aid rules to religious establishments deemed to carry out economic activities using public funding. The Court was asked whether these religious establishments could have been exempted from a municipal tax due to the purely religious nature of the activities conducted, as part of the Catholic Church. The exemption was refused on the ground that the activities performed in these buildings were not purely religious instead they were offered for remuneration[36]. Performing certain activities for remuneration (in this case buildings used for classes and canteen) makes the consumer willing to pay for the value it obtains, even if the entity is non-profit[37]. In social services, such as health or education, beneficiaries do not pay a consideration for what they receive,

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[30] Case C-67/96, *Albany v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.
[31] Opinion of Mr Jacobs, Case C-67/96, Joined Cases C-115/97, C-116/97 and C-117/97 and Case C-219/97.
[32] See Gyselen L., Case C-67/96, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie; Joined Cases C-115–117/97, Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmateri, in Common Market Law Review, 37(2), 2000, Wolters Kluwer, pp. 425-448; Jones A., Sufrin B., Dunne N., *EU Competition Law. Text, Cases, and Materials, Seventh Edition*, Oxford, 2019.
[33] Case C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL* [2011] ECR I-00973.
[34] Ibid, par 65.
[35] Case C-74/16 *Congregacìon de escuelas Pìas Provincia Betania v Ayuntamiento de Getafe* [2017] ECLI-496;
[36] See Nicolaides P., *Not Even the Church Is Absolved from State Aid Rules: The Essence of Economic Activity*, in European State Aid Law Quarterly 4, 2017, pp. 527-536;
[37] Ibid. 184, para. 40;

they have a right and/or a need to receive it. The possibility to severe economic and non-economic activities requires a specific evaluation for each activity and eventually, the possible financial link between the two natures to finance non-economic activities with the profits of the economic ones does not impede to separate and classify as economic those concerned[38].

In 2020, authors van de Gronden and Guy[39] bring a rationalization to the analysis of the undertaking concept, with the aim to weigh economic and solidaristic elements: first of all, it is necessary to apply the abstract test, would the activity potentially be supplied on the market? Would it be required the intervention of the State? Without taking into consideration the national legal framework, if the State must intervene in providing the service, the activity is not economic. Secondly, only for social security schemes, the analysis moves to the concrete test: if the national legal framework entrusts a body with the task of financing the social security scheme and this is mainly solidarity-based, the body is not engaged in an economic activity and is not an undertaking.

Developing this reasoning, the authors recall a recent case *CEPPB*[40], dealing with tax exemptions for religious institutions in Spain, in which it was asked to the Court if a religious congregation operated as an undertaking, in providing educational services. The Court reaffirms the possibility to perform both economic and non-economic activities and what matters is the absolute State intervention in financing the activity. Through taxation, the State guarantees access for all to an essential service, such as education.

To sum up the test applicable to the provider of a social service is: 1) Does the supply of the service mainly depend on public funding? 2) Is the aim an objective of public interest? 3) Are the concerned activities related to this objective?

In conclusion, both the concepts of economic activity and undertaking are extremely relative and variable, even though over time, the settled case law highlighted the recurring features indispensable to define these notions: when a non-economic activity switches into an economic one, the entrustment of an SGI mission can overweight the economic interests.

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[38] See Collins A.M., Navarro M.M., *Economic Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango,* in Journal of European Competition Law & Practice, vol. 12(5), 2021, pp. 381-382; also Judgement of 20 September 2019, *Port Autonome du Centre et de l'Ouest v Commission,* T-673/17, EU:T:2019:643, para. 102-106;

[39] See van de Gronden J., Guy M., *The role of EU competition law in health care and the undertaking concept,* in Health Economics, Policy and Law, Cambridge University Press, 2020;

[40] Case C-74/16 *CEPPB v Ayuntamiento de Getafe* [2017] ECLI:EU:C:2017:496; see van de Gronden J., *Services of General Interest and the Concept of Undertaking: Does EU Competition Law apply?* in World Competition 41(2), p. 197-224, Kluwer Law International, 2018;

2. Factual Background

In 1994, Slovak health insurance system changed from a unitary system with one State-owned health insurance company to a pluralistic model where both public and private entities could operate. In 2005 an in-depth reform[41] entered into force and changed the legal status of the entities (profit-seeking joint stock company governed by private law) and the redistribution of the collected health insurance contributions. Ownership regulation allows both the State and private sector entities to be shareholders.

In Slovakia, all health insurance companies (public or private) provide compulsory health insurance for Slovak residents[42], with the possibility to provide voluntary health insurance for those who are excluded from compulsory insurance.

Since 2005, Slovak residents can choose among three insurers to obtain a compulsory health insurance package: 1) Všeobecná zdravotná poisťovňa a.s. (VšZP)[43] and Spoločná zdravotná poisťovňa a.s. (SZP), which merged on 1 January 2010 and whose sole shareholder is the Slovak State; 2) Dôvera zdravotná poisťovňa a.s. ('Dôvera')[44], whose shareholders are private sector entities; and 3) Union zdravotná poist'ovňa a.s. ('Union'), whose shareholders are private sector entities.

Insured persons have the right to opt for a health insurance company of their choice and to switch insurance company once a year. Insurance companies have the legal obligation to admit every person who meets the legal requirements. They cannot refuse a person on the grounds of age, health or disease risks and have to offer basic health insurance at the same price to all persons regardless of these factors. The basic benefit package is not linked to the amount of contributions paid. However, insured persons may add additional benefits of their choice which are offered free of charge as part of the same healthcare package.

The Slovak health insurance system includes a risk equalization scheme where health insurance companies insuring persons associated with a higher risk receive funds from insurance companies whose portfolio is associated with lower risk.

Following a complaint lodged by Dôvera on 2 April 2007 concerning state aid allegedly granted by the Slovak Republic to SZP and VšZP, the Commission initiated a formal investigation procedure on 2 July 2013.

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[41] Act N° 580/2004 and 581/2004;

[42] See European Commission *Your social security rights in Slovakia*, Directorate-General for Employment, Social Affairs and Inclusion, EU 2020;

[43] It was established as the successor of the National Insurance Company (Nàrodnà poist'ovna) of the Health Insurance Fund Administration;

[44] As a result of a merger on 1 October 2005 with another privately-owned health insurance company, the entity is the largest privately-owned health insurance company in Slovakia;

3. Commission Decision on the measures implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP)[45]

Dôvera, the privately-owned company, lodged a complaint on 2 April 2007 on the grounds of six contested measures allegedly considered state aid: a capital injection by the Slovak Republic into the State-owned company (SZP) between 2005 and 2006; a new State agency with the task to discharge all debts prior to the reform of 2005 of all healthcare facilities and health insurance companies, implementing a discriminatory treatment in the discharging process; a subsidy provided in 2006 to SZP to settle its liabilities; a capital increase in 2010 when VsZP was close to insolvency; several direct transfers, by intervention of the State, to SZP and VsZP of portfolios of other insurance companies liquidated over time, even though there were other operators interested on the market.

When the parties filed their comments during the investigation, Dôvera stated that the 2005 reform was meant to establish a competitive market and it was pointed out to the fact that insurers compete for healthcare providers through selective contracting and negotiations on price and quality of services. The purely social nature of the system is denied by the possibility to make and distribute profits and the willingness of private investors to invest in operators active in the Slovak compulsory insurance sector[46].

The capital injections and the debt-discharging process highlighted a more favorable treatment of SZP and VsZP than the private operators, adding the failure to demonstrate that the provision of compulsory health insurance is a service of general interest compliant with the Altmark case law and the Commission's SGEI package[47].

On the other hand, the Slovak Republic filed its comments strengthening the position of the compulsory insurance system and clarifying that the system has a social objective and it is based on solidarity (compulsory enrolment, minimum level of benefits guaranteed to all insured persons, contributions are fixed by law and the RES). The goal of the 2005 reform was not to establish a competitive market in the field of social security but to set precise rules for dealing with financial resources allocated to health. The possibility to compete on the service quality could be seen as an element that encourages to operate economically according to a solid management, in the interest of the proper functioning of the system, without changing the non-economic nature of the system as a whole[48]. The Slovak Republic underlined the fact that the reported surplus of VsZP resulted in the

[45] Decision of 15 October 2014 on the measures SA.23008 – 2013/C (ex 2013/NN);
[46] See point 56-57 of SA.23008;
[47] Points 58-59;
[48] Points 65-66;

creation of a health care fund to cover the use of health care and to finance costly health care covered by the public insurance. It also reported the internal investigation of the Slovak Antimonopoly Office in 2009 which revealed how the system was characterized by a high degree of solidarity, health care was provided free of charge and the essential elements are regulated by the State[49].

3.1 The Commission's Assessment of the Measures

At the beginning, the Commission expressed its doubts on the relation and determination of the economic and non-economic nature of the activity concerned and for this reason, it decided to open a formal investigation. After completing the formal investigation, the Commission asked the concerned parties to provide more information to assess whether the alleged measures could be considered a violation of the State aid provisions.

Article 107(1) TFEU and the related provisions on State Aid are applicable only if the recipient of the alleged aid is an undertaking under EU law. The settled case law affirms that an undertaking is "any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed"[50]. The economic activity may exist if provided on a given market and whether a market exists may depend on the internal features and organization carried out in the single Member State. Particularly, health care schemes could be considered economic activities when the Member State sets up and structures it with economic specificities. Whether the scheme may be considered solidarity-based the case law of the Court of Justice elaborated a series of elements relevant in this respect: the compulsory affiliation; the exclusive social function; the non-profit purpose; benefits are independent of the contributions made and not necessarily proportionate to the person's income; the scheme is under the State supervision[51]. When the scheme has both economic and solidaristic elements the Commission must weigh the importance of each element and assess how the activity is organized and carried out in that Member State. Due to the compulsory affiliation, medical services provided under the health insurance coverage are independent of the contributions paid, insurers cannot refuse a person on the grounds of age, risk or health and each insured person receives the same basic level of benefits[52]. Additionally, the Slovak system is under a strong regulatory framework which establishes the legal status, the obligations and the State supervision.

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[49] Investigation performed by the Antimonopoly Office in connection to the proposed merger between SZP and VsZP, completed on 3 December 2009;

[50] As examples, Joined Cases C-159/91 and C-160/91 *Poucet et Pistre* [1993] ECR I-637; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para. 74

[51] See *Poucet et Pistre* para. 13; Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, para. 45; Joined Cases C-264/01, C-306/01, C-345/01 *AOK Bundesverband* [2004] ECR I-2493, para. 47-55;

[52] Points 85-87 of the SA.23008 Decision;

The Commission's final decision on the evaluation of the measures pointed out the central solidarity objective of the overall system scrutinized. All the features concerning a compulsory insurance program, contributions fixed by law, a guarantee of the same basic level of benefits and a strong regulatory framework, lead to exclude that SZP/VZP could be considered as "undertaking" under article 107(1) TFEU.

Even though the Commission acknowledges the presence of competition elements in this system (the presence of several operators, for-profit activities and the openness to the market), it concludes that they cannot change the nature of a system predominantly solidarity-based and oriented. Moreover, health insurance companies are engaged in quality and procurement efficiency competition to provide the necessary inputs to fulfil their role[53].

The Slovak health insurance system is non-economic in nature, the recipients of the measures are not considered "undertakings", therefore not subject to the State Aid rules[54]. Therefore, the Commission stated the lack of reason to examine the other conditions for the existence of State Aid.

4. The Judgement of the General Court in 2018[55]

What contributed to the rise of this saga was the different assessment conducted by the General Court to the appeal brought by Dôvera and the weight conferred to the elements of competition detected in the health insurance system which contested the assessment given by the Commission.

On 24 April 2015, Dôvera, supported by "Union", brought an action for annulment of the Commission Decision SA.23008 finding no state aid granted to SZP and VsZP by the Slovak Republic.

The applicant's (Dôvera) first plea in law was that the Commission erred in its interpretation of the concept of undertaking which was considered too narrow and limited to the review of the single compulsory health system, when it should have expanded the analysis beyond the compulsory domain. The second plea concerned the misinterpretation of the concept of economic activity which resulted in excluding SZP and VsZP as undertakings.

The General Court recalls that to apply the State Aid measures it is necessary the presence of all conditions set out in article 107 TFEU (State resources or intervention, effect on trade between Member States, selective advantage granted and distortion or potential distortion of competition)[56]. In the case of health insurance systems, the Court clears out that the social aim in itself is not sufficient

[53] Point 93;
[54] Point 100;
[55]Case T-216/15 *Dôvera zdravotnà poist'ovna, a.s. v European Commission*, Judgment of the General Court (Second Chamber) of 5 February 2018, ECLI:EU:T:2018:64
[56] Points 45-48;

to exclude the economic nature[57] and recalls what are the elements of solidarity required not to be considered economic (compulsory affiliation, lack of direct links between the contributions and benefits, proportionality). The Court continues upholding the Commission's conclusion which considers the Slovak system as non-economic because of the predominant solidaristic elements but it focuses on the possibility for insurers to make and distribute profits and compete on the quality offered. Point 64 of the decision contradicts the Commission's conclusion on the ground that the possibility to make and distribute profits shows that "*they are pursuing financial gains"* and this activity is an economic activity despite the strict State regulation on the use and distribution. Moreover, the introduction of certain complementary and preventive treatments in the context of the basic compulsory services makes the health insurers able to differentiate themselves in terms of quality and scope. Besides the compulsory benefits, operators may compete through "the value for money" of the cover they offer. Finally, competition in the system may be found in the power of insured persons to freely choose their provider and switch it once a year which increases the market volatility[58].

The General Court concludes its assessment upholding the applicant complaint and refuses that the Slovak compulsory health system is non-economic in nature, therefore orders the annulment of the Commission Decision.

5. The Judgement of the Court of Justice of 11 June 2020[59]

The Commission and the Slovak Republic appealed the General Court decision and asked to set aside the judgement to the Court of Justice.

In support of their appeals the Commission and the Slovak Republic raised three grounds of appeal[60]: infringement of the obligation to state reasons; the misinterpretation of the notion of undertaking within the meaning of article 107(1) TFEU; the distortion of evidence. The Slovak Republic raise another ground of appeal alleging that the General Court exceeded the limits of its judicial review.

5.1 The Opinion of Advocate General Pikamae[61]

Advocate General Pikamae started the assessment on the ground of misinterpretation of the notion of undertaking and economic activity considering that the General Court concluded and classified as

[57] Points 50-53;
[58] Points 66-67;
[59] Joined Cases C-262/18 and C-271/18 P *European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s*, Judgement of the Court (Grand Chamber) of 11 June 2020;
[60] Appeal brought on 16 April 2018 by the European Commission against the judgement of the General Court (Second Chamber) delivered on 5 February 2018 in Case T-216/15: Dôvera v European Commission (Case C-262/18 P);
[61] Delivered on 19 December 2019;

economic the Slovak health insurance scheme on the grounds of: competition between the entities and the presence of for-profit operators other than the entity concerned[62]. The AG did not agree on the interpretation of the General Court that the ability to use and distribute profits, even though the ability was more strictly regulated than other sectors and specific requirements were asked, called into question the non-economic nature of the activity, because it was irrelevant starting from the point the operator seeks to make profits. When the General Court recalled the MOTOE judgement[63] to elevate the for-profit element as a characteristic of the economic nature. The reference in the AG opinion, instead, makes the for-profit seeking activity irrelevant to the classification. Non-profit seeking operators can be classified as economic because they can offer goods and services on a given market placing themselves in competition with other operators. The main issue is not the profit-seeking activity but the possibility for the entities concerned to be in competition with each other. In the case at issue, it is important to understand how the Slovak system has been conceived and whether the system must be regarded as open to competition[64]. When the system is hybrid with both economic and non-economic elements, the classification is a "matter of degree". The Slovak health insurance as pointed out in both SA Decision and the General Court decision had all solidaristic elements set out in the case law and also the economic elements which made the General Court tend for the economic nature. The AG recalls the *FENIN* judgement[65] where the nature of the activity depends not only on the act of purchasing goods or services but also the subsequent use of those goods and services. Additionally, the competition on quality and efficiency, which weighted for the economic nature, are not so essential and strong to conclude in that sense. In the settled case law insurance schemes were based on the principle of capitalization, optional or mandatory affiliation or determination of the contributions left upon the entities did not create the activities economic in nature. The Slovak system could be compared to the AOK judgement[66] and found a higher degree of competition when AOK permitted to compete in the amount of contributions whose rate was determined independently. The economic regulation on profits was conceived to make social funds operate as effectively as possible to attain the social objective of the system[67].

In the same line of reasoning, the Advocate General followed the Commission's assessment on the nature of the entity and activity concerned, giving the same interpretation and functional meaning to the economic elements included.

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[62] Point 89-90;
[63] Case C-49/07 MOTOE [2008] ECR I-04863 para. 27;
[64] Point 113;
[65] Case C-205/03 P *FENIN v European Commission* [2006] ECR I-06295 para. 78;
[66] Case C-262/01 *AOK Bundesverband and Others* [2004] ECR I-02493 para. 84-95;
[67] Point 127;

To conclude, the Advocate General suggested to uphold the grounds of the appeal on the misinterpretation of the notion of undertaking and economic activity conducted by the General Court.

5.2 The interpretation delivered by the Court of Justice

In this dialogue among the Commission, the General Court and the Advocate General, the Court of Justice confirms the original Commission's assessment and follows the AG's opinion. It also concludes its reasoning by acknowledging the application of competition elements to improve efficiency and quality of social security schemes.

The Court of Justice restated in its assessment that state aid measures under article 107 TFEU can only be applicable to entities considered undertakings. Undertakings must be classified related to the nature of the activity performed. Offering goods and services on a given market according to the settled case law consists in an economic activity[68]. The Court continues restating the principle that Member States are free to organize their social security systems but for the purposes of classifying the scheme as non-economic in nature quotes the elements displayed in the settled case law. Particularly, it is necessary to assess the degree of solidarity involved and the supervision of the State. The Court pointed out how the Slovak Republic entrusts the management of a social security scheme to various insurance bodies without doubt based on the principle of solidarity because the bodies equalize costs and risks between themselves. For the introduction of competition elements, those did not change the nature of the activity which in the same manner as *AOK* judgement, intended to "*encourage operators to operate in the most effective and least costly manner possible, in the interest of the proper functioning of the social security scheme*[69]*".*

To assess the necessary use and distribution of profits, the Court highlighted how the 2005 Slovak reform obliged all insurers to change the legal status into for-profit joint stock companies governed by private law and for this they could not classified as undertakings. The legal status of the entity is not relevant for the classification.

Also, the General Court affirmed in paragraph 66 that there is no competition for the compulsory statutory benefits and the amount of the contributions, even if the insurers can supplement the services provided these are free of charge and allow operators to differentiate themselves in an ancillary manner[70].

The possibility for insured persons to change once a year operator and freely choose the insurance company express the idea of proper functioning of the health system[71].

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[68] Point 29; Case C-41/90 *Hofner and Elser* para. 21; Case C-437/09 *AG2R Prévoyance* para. 41;
[69] Point 34;
[70] Point 42;
[71] Point 45;

Competition elements introduced to ensure an efficient and cost-effective management cannot change the nature of the service, which pursues a social objective and applies the principle of solidarity.
Finally, the Court set aside the judgement of the General Court and dismissed the action brought by Dôvera.

6. The Post-Dôvera consequences and open issues

The essence of a market lies in the voluntary interaction between demand and supply; these transactions are conducted on a voluntary basis and in exchange of remuneration. Dealing with social security schemes based on solidarity, these are non-economic in nature because of the lack of transactions. This traces the difference between private and public social insurers[72]. The Court assessment of the economic elements introduced into a social security scheme pursuing a social objective was to be seen as functional to the social objectives[73].
The General Court on 2 June 2021 delivered a decision in case T-223/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v Commission* where certain elements of competition among hospitals in Italy could change the nature of a health care system from non-economic to economic[74]. The Italian health care system is organized within the national health service (Servizio Sanitario Nazionale) and services are provided free of charge to all patients enrolled. The costs are financed by social security contributions and other State resources. Casa Regina lodged a complaint claiming the Commission failed to assess the extent of economic activities and the applicability of the Altmark conditions.
The General Court noted how all patients could choose hospitals, hospitals are obliged to provide free medical care and have a certain degree of discretion to control their expenditures[75]. These features of competition did not change the nature of solidarity in the Commission's assessment.
To evaluate the nature of the health system the General Court referred to the Dôvera case for the established principle of social objectives pursued, the principle of solidarity and the State supervision. The presence of economic activities and freedom to choose hospital made Casa Regina claim the economic nature of the activity. The General Court stated that the SSN system was characterized by compulsory affiliation, contributions fixed by law and proportional to the income of the insured persons and the same compulsory benefits. The principle affirmed in Dôvera which permits the

[72] See Nicolaides P., *Health Insurance based on social solidarity is non-economic,* 30 June 2020, State Aid Uncovered, Lexxion Publisher;
[73] See Gallo D., Mariotti C., *Social Services of General Interest*, ch. 9, in Hancher L., Ottervanger T., Slot P.J., *EU State Aids 6th Edition,* Sweet&Maxwell, 2021, p. 371
[74] See Nicolaides P., *The Italian Health System is not economic in nature,* State Aid Hub, Lexxion Publisher, 20 july 2021;
[75] Para. 125 of the case T-223/18;

introduction of competitive elements intended to encourage operators to improve their management and efficiency[76]; it is restated for Casa Regina in which the SSN performs both economic and non-economic activities separately kept in the hospitals' accounts. Casa Regina's reasoning was based on the erroneous premise that the principle of solidarity excluded all competition.

The Court of Justice in Dôvera explained how the General Court gave too much significance to the competition elements without considering the relation to the social and regulatory framework. The profit-seeking nature was necessary to ensure continuity of the scheme and the attainment of the social and solidarity objectives[77]. The limited nature of the economic elements, the functional use made of them to ensure a solid management and efficient services and the only presence of profit-seeking operators in a health insurance scheme does not make all entities undertakings.

By contrast, it could be objected that the Court's analysis remained theoretical because it didn't examine whether the benefits and premiums under those conditions would have incentivized the insurers efficiency in Slovakia[78]. Professor Nicolaides argued in its analysis of the Dôvera case, whether a regulator would have introduced incentives in a sector were undertakings are not willing to compete, provided that once insurers were allowed to make extra profit, competition would have developed spontaneously.

Once again, the assessment of what constitute an economic and non-economic activity, how much competition elements could change the nature of the service performed and the dialogue between the Commission and the ECJ are left suitable to be defined only on a case-by-case analysis which does not always follow a straight line.

[76] Para. 164;
[77] Point 40;
[78] The same could be referred to *"Casa Regina";* see Nicolaides P., *ibid* 34;